LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 6 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1208

EGON OLDENDORFF

versus

EDWARD PARKER

EGON OLDENDORFF

versus

J. P. FLORIO & COMPANY

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TERRIBERRY, CARROLL, YANCEY
& FARRELL
Benjamin W. Yancey
John A. Bolles
2141 International Trade Mart
New Orleans, Louisiana
70130

Attorneys for Petitioner

I N D E X

	PAGE
Citations to Opinion Below----------	1
Jurisdiction----------	2
Questions Presented----------	2
Statement of the Case----------	2
Reasons for Granting Writ----------	5
Conclusion----------	15
Proof of Service----------	15
APPENDIX "A"---------- Judgment of the U. S. Fifth Circuit Court of Appeals	17
APPENDIX "B"---------- Judgment of the U. S. Fifth Circuit Court of Appeals	20

TABLE OF AUTHORITIES

CASES	PAGE
Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926, 4 L.ed. 2d 941 (1960)----------	9
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953)-	9
Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S. Ct. 872, 90 L.Ed. 1099 (1946)-	9
Devitt & Blackmar, Federal Jury Practice and Instructions,(2nd Edition) Vol. 2, Sec. 93:04----------	10

CASES PAGE

Weyerhauser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 78 S. Ct. 438, 2 L.Ed. 2d 491 (1958)---------- 11

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

NO.

EGON OLDENDORFF

VERSUS

EDWARD PARKER

EGON OLDENDORFF

VERSUS

J. P. FLORIO & COMPANY

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Egon Oldendorff, the petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on July 24, 1973 and the judgment denying rehearing entered on November 8, 1973.

CITATIONS TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, printed in Appendix "A", is reported at 483 F.2d 375.

The opinion of the United States Court of Appeals for the Fifth Circuit denying defendant's petition for rehearing, printed in Appendix "B", is unreported.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28, Section 1254 (1) of the United States Code.

QUESTIONS PRESENTED

(1) Was the seaworthiness charge given by the Trial Court properly framed so as to fully and accurately instruct the jury in the law on that issue?

(2) Was the Trial Court's refusal to give the unseaworthiness instruction requested by the plaintiff prejudicial error?

(3) After one longshoreman is injured, is it a breach of a stevedore's warranty of workmanlike performance to continue to conduct cargo operations in the same fashion leading to a second injury which occurs under almost identical circumstances?

(4) Under the factual situation presented at trial having reversed the jury's verdict in favor of the shipowner/defendant and against the plaintiff, was the Court of Appeals in error in not reversing the trial court's denial of the defendant/shipowner's recovery over and indemnity against the third-party defendant/stevedore?

(5) Was it error below, in reversing a jury verdict against the plaintiff while affirming the Trial Court's denial of indemnity, to refuse to limit the issues on re-trial to those presented in the original trial?

STATEMENT OF THE CASE

This matter involves a claim by

longshoreman Edward Parker against Egon Oldendorff, owner of the M/V DORTHE OLDENDORFF. Egon Oldendorff filed a third-party complaint aginst the plaintiff's employer, J. P. Florio & Co., Inc., seeking indemnity for any damages which might be awarded in favor of the plaintiff against Egon Oldendorff or the vessel, and for recovery of all costs, expenses and attorneys' fees incurred in defense of the plaintiff's claim. Other parties were joined in the original litigation but they are not involved in this petition.

On May 4, 1969 the vessel M/V DORTHE OLDENDORFF was at the port of New Orleans. The vessel was under time-charter to Holland-America Lines, whose representatives had arranged for a consignment of pulp paper to be delivered to the vessel for loading. J. P. Florio & Co., Inc., a local stevedoring contractor, was engaged to load the vessel. The pulp paper was packaged in rectangular bales, each weighing an estimated 300 to 500 pounds. The bales were secured by two long wires and four short wires.

The plaintiff and his co-workers made up a gang of longshoremen assigned to load and stow the bales in the vessel's No. 4 hold. They boarded the vessel, and cargo operations commenced under the supervision and control of stevedoring personnel at 0800 hours, or shortly thereafter. The method of loading and stowing which the stevedore utilized consisted of transferring the bales from the wharf to the hold on pallet boards by means of the ship's gear. When the loaded pallets were landed in the hold, the longshoremen inserted their cargo hooks under the wire bands around the bales and rolled the bales off the pallet boards. They then dragged each bale to the spot where it was to be stowed by pulling on the wire bands

with their cargo hooks.

During the morning an undertermined number of bands broke. However, it is undisputed that at approximately 0930 hours, Walter Tanner, one of the plaintiff's coworkers, was hurt when a band on which he was pulling broke and he fell. Tanner's accident was witnessed by the plaintiff and by the stevedore foreman. Tanner continued to work that day, although he was subsequently disabled as a result of injuries received in his fall. Following the first accident the stevedore admittedly did nothing to inspect the bands or the working conditions, did not stop the work and did not attempt to change the work method utilized. The foreman testified he simply warned the men to be careful. Approximately 45 minutes later, Tanner, who continued to work that day although he was subsequently disabled, and another longshoreman were "breaking down" a bale from atop others on a pallet when a band broke and the bale went out of their control, striking the plaintiff, who was standing in very close proximity, with his back turned.

On January 10, 1972 the case came on for trial. On January 12, 1972 the jury returned a verdict in favor of the defendant and against the plaintiff. That verdict was entered as a judgment on January 20, 1972.

Subsequent to trial, defendant Oldendorff moved to amend the judgment to grant it indemnity and recovery of its costs, expenses and attorneys' fees from third-party Florio. That motion was denied and a judgment entered on January 26, 1972.

Plaintiff's motion for new trial was denied in a minute entry entered on February

16, 1972.

Notices of appeal were entered on behalf of Oldendorff and Parker on February 24, 1972 and March 1, 1972, respectively.

The appeals came on for hearing on March 12, 1973. On July 24, 1973 a decision of the Fifth Circuit was rendered in which the jury verdict was reversed and the court's decision on indemnity was affirmed. Circuit Judge Ainsworth dissented.

Oldendorff's petition for rehearing which was filed on August 15, 1973 was denied on November 8, 1973.

REASONS FOR GRANTING WRIT

Questions 1 & 2. During trial, at a conference, counsel for the plaintiff requested a charge on the issue of the vessel's seaworthiness which was designated "Plaintiff's Special Requested Charge No. 1". It reads as follows:

> "If you find the wire [with] which the bales were bound was too light for one of its purposes, namely its use in dragging the bales of wood pulp after longshoremen's hooks had been connected therewith, that this wiring would be defective and defective wiring would constitute unseaworthiness."

Although the court at first indicated it would give the charge, it later reconsidered and determined the requested charge was not a correct statement of the law. Instead the charge given read as follows:

"The plaintiff says: "Not only that

I was hurt because of your negligence, but the ship was unseaworthy." The shipowner owes the duty to a longshoreman working thereon such as this plaintiff was in this case. owes him the duty of furnishing him with a reasonably seaworthy ship. The shipowner cannot delegate that duty to anybody else. If he furnishes a seaworthy ship and because of something somebody else does causes it to become unseaworthy, nevertheless, it's the shipowner's responsibility.

Under the maritime law every shipowner or operator owes to every longshoreman working aboard its vessel the absolute and non-delegable duty, meaning you can't delegate it to somebody else, to furnish a seaworthy vessel and to keep and maintain all decks, passageways, appliances, gear, tools, and equipment of the vessel in a seaworthy condition at all times.

To be in a seaworthy condition means to be in a condition reasonably suitable and fit to be used for the purpose or use for which it is provided or intended.

An unseaworthy condition may result from the lack of a competent crew, the lack of adequate man power to perform a particular task on the vessel, the improper use of other seaworthy equipment and the improper stowage, loading or discharge of the cargo.

Liability for an unseaworthy condition ad distinquished from that, does not in any way depend upon negligence or fault or blame; that is to say, the vessel owner is liable for all injuries and consequent damage proximately caused by an unseaworthy condition existing at the time, even though the shipowner or operator may have exercised due care under the circumstances and may have had no notice or knowledge of the non-seaworthy condition which proximately caused the injury and damage.

The shipowner is not obligated to furnish an accident free ship, nor is he obligated to furnish the best, most modern and most convenient appliances and equipment, but only such that are reasonably proper for their intended use. Even though appurtenances supplied might not be the best, if they are reasonably proper for their intended use that is all that is required.

A ship need not be free from all possibility of mishap for the seaworthiness of a vessel is a relative concept in each instance on the circumstances on which its fitness is drawn in question. Crucial consideration is whether the vessel, its equipment, its cargo, its crew and officers were reasonably fit to permit the plaintiff to perform his task with reasonable certainty."

The majority in the Court of Appeals took issue with the charge as not being sufficiently informative on the question of

whether the purpose of the bands was to drag the bales of wood pulp from place to place. The fact is, however, one of the main questions below was whether the bands were to be used for dragging the bales. The requested charge "Plaintiff 1" is tantamount to a directed verdict on this issue as it instructs the jury that one of the uses of the bands was to drag the bales. Regardless, this issue, if it had to be highlighted at all to a jury which had heard three days of testimony and counsel's arguments concerning the bales and their use was presented to the jury in a later portion in the charge, as follows:

> "The shipowner does not warrant the seaworthiness of the cargo per se, but does warrant the seaworthiness of the cargo container; that is the bands in this case. If you find that the bands in this case were reasonably fit for the purpose for which they were to be used, the vessel would not be unseaworthy."

Looking at the charge as a whole, it is obvious the majority is in error in reversing the jury's verdict on liability. The charge did not prejudice the plaintiff. To the contrary, he got everything to which he was entitled.

The basic elements of the duty of seaworthiness are threefold: First, the obligation is a non-delegable one, secondly, the appurtenance or object in dispute must be <u>reasonably</u> fit and suitable for its <u>intended purpose;</u> finally, the duty is one which is not dependent on negligence. The plaintiff's requested charge includes only one of these elements while the charge which was given included all of them. The Court's instruction is correct and in line with the

leading jurisprudence on the issue of unseaworthiness. Mitchell v. Trawler Racer, Inc., 362 U.S. 539, 80 S. Ct. 926, 4 L.ed.2d 941 (1960); Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143 (1953); Seas Shipping Co. v. Sieracki, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946). It is also of interest that the charge given parallels closely that included as a model in a text concerning instructions in federal court. See Devitt & Blackmar, Federal Jury Practice and Instructions, (2nd Edition) Vol. 2, Sec. 93:04.

Whereas the plaintiff's requested charge is incomplete and, if given, would have been prejudicial to the defendant, the charge given when taken as a whole is a fair one which does justice to all parties. It provided an adequate basis on which the jury could and did decide the case and as it was given it formed a framework within which the plaintiff could couch his closing arguments.

The comments of Judge Ainsworth in his dissent point out the error committed by the majority:

> "The trial judge did not give the instruction on unseaworthiness in the language proffered by plaintiff's counsel, though he had agreed to do so. But the instruction which the Court gave was sufficient to cover what was reasonably necessary under the facts developed in the trial. Considering the instructions as a whole and the specific charge as to unseaworthiness in connection with the cargo bands, I believe the charge was sufficient under the law and prior holding in this court, and that the jury could and did

> intelligently decide the case on the evidence.
>
> The district court's failure to give the jury charge agreed upon was a matter of trial court discretion which I consider was not abused, and which does not require reversal."

Questions 3 & 4. Having examined in minute detail the plaintiff's case and after finding grievous error in the Court's instruction the majority then rushes to accept without question the Trial Court Judge's findings and conclusions on the indemnity features of the case, findings which were prepared by counsel for the third-party defendant/stevedore and adopted by the Court in toto. In reaching this decision the Court completely misconstrues the evidence.

Oldendorff realizes this is not the proper time to review the evidence and will not attempt to do so. However, considering the facts which were brought out through the testimony, it is clear the Trial Court's decision on indemnity was incorrect.

First, it is of the utmost significance that the cargo in question was being loaded at the time Parker was injured. This was not a situation where the stevedore was working with cargo loaded at some distant port and which had survived the rigors of an ocean crossing. The bundles of pulp had been in the stevedore's hands at least from the time they were moved from the warehouse to shipside for loading. They were stacked on the pallets by longshoremen and moved into the hold by stevedoring personnel. The bale which struck Parker was not even at rest in the stow when he was hurt. Rather it was still in the process of being loaded, by

Florio longshoremen, when the accident occurred.

We disagree with the Appeal Court's statement that the dragging of bales into place by using the wires was a normally safe practice or that no bands had popped before Parker was hurt. However, even assuming that these bands were customarily used to move cargo and were not known to break, the fact that one broke when Tanner pulled on it causing his injury should have been sufficient to place the stevedore on notice and require him to take remedial steps.

The majority misunderstood the facts concerning the acceptability of using bands for pulling the bales and the breaking of bands before the accident; but, even more telling, they have confused the identities of the witnesses, giving expert weight to the testimony of individuals who were never so qualified. The result of this is that the majority reaches the extraordinary conclusion that the stevedore acted reasonably in continuing to work in the face of a known dangerous condition - a condition concerning which the vessel had absolutely no knowledge. This contra to the present posture of the law on this point. Weyerhauser S.S. Co. v. Nacirema Operating Co., 355 U.S. 563, 78 S. Ct. 438, 2 L.Ed. 2d 491 (1958); Crumady, supra.

What the stevedore did after Tanner's popping accident was to warn the men to be careful and to avoid standing near an open bulkhead. First, it is highly questionable whether the open bulkhead had anything to do with Parker's accident, so it should be apparent that that warning had nothing to do with preventing his injury. Secondly, merely warning the men to be more careful

was no remedy at all. It should go without saying that a shipowner had the right to rely on a stevedore to furnish experienced longshoremen and foremen mindful for their and others' safety. Here, however, caution was apparently not the byword. First, it takes no expert to realize that one does not pull a bale from atop another, allowing it to fall free, if a man is working two feet away with his back turned as was Parker. This is particularly so if the only means of controlling the bales is the wire bands and similar bands previously have broken within a very short time span. The handling of the bales involves techniques which are within the special competency of the stevedore, and the appellate court's denial of indemnity was incorrect.

It is clear from the testimony that the vessel had absolutely nothing to do with the cargo operation. The method of handling the cargo either created an unseaworthy condition or brought one into play, and this was a circumstance of which the stevedore had both actual and constructive notice.

We believe the Court of Appeals' decision flies in the face of well established jurisprudence on this issue. Although we must agree that the vessel technically warranted the seaworthiness of the cargo containers which were in its custody and control, or in this case in its constructive custody and control, as all aspects of the loading operation were in the control of the stevedore, the vessel's duty was to refrain from any activities which would have interfered with the stevedore's ability to render a workmanlike performance.

Although a stevedore has a duty only to discover defects which are obvious from

a cursory inspection, here the dangerous possibilities of pulling on the bands were known as a result of a similar accident which occurred a short time before Parker was injured. A defect which is in fact observed cannot be overlooked. Once on notice of a potentially hazardous situation, the stevedore has the obligation to take remedial measures itself or stop work until the situation is corrected. Here the stevedore's remedial steps were the same as doing nothing at all. In reality, the potential danger and possible consequences which should have been clear to the stevedoring expert were simply not realized until a second man was hurt. The stevedore brought it into play and had the last, as well as only, opportunity to prevent the accident.

Question 5. Although Oldendorff disagrees with the majority's decision both as to the jury verdict and the denial of indemnity, the combination of the two places the shipowner in an unfair and intolerable position. Particularly in light of this accident having occurred during loading, the ship was the most passive of participants in the events leading up to Parker's accident.

Despite this the majority, after affording the plaintiff a completely new day in court, states that "having had a full fair opportunity to try the indemnity issue to the court, the parties [Oldendorff] are not entitled to a second trial of that issue merely because we have reversed the jury tried portion of the case on unseaworthiness". This is preposterous.

The plaintiff has been given carte blanche to develop any new theory of liability he wishes. It should be obvious to one having even a passing familiarity with cases of this

sort that it is the theory of the plaintiff's case which determines the defendant's case for indemnity. Here the plaintiff has made one thrust only to be defeated. Now, however, he will be allowed to thrust in any direction he chooses, but if that new approach results in a clear indication of stevedore's fault, the ship will be precluded from seeking recovery over.

This is an inequitable and unjust result. If plaintiff is to be allowed a new day so should the shipowner. If indemnity is to be denied, then the plaintiff's new day should be limited to the crucial question already presented at trial, whether the bands were intended to be pulled upon and, if so, whether they were adequate for this purpose.

Judge Ainsworth, in dissenting, places this aspect of the case in the proper perspective:

> "Especially disturbing is the conclusion of the majority to foreclose the issue of indemnity against third-party plaintiffs, on remand and retrial of this case. Fundamental equity requires that the indemnity issue should likewise be retried. Third-party plaintiffs are deprived of basic fairness by the majority's denial of the opportunity to develop facts and evidence in light of the majority opinion and to obtain a new ruling on the issue of indemnity. If plaintiff is to be accorded a new day on the question of unseaworthiness, evenhanded justice also requires a similar opportunity to third-party plaintiffs on the indemnity issue."

CONCLUSION

Because of the Court of Appeals' error in misconstruing both the facts and the law, it is respectfully submitted that a writ of certiorari should issue.

Respectfully submitted,

TERRIBERRY, CARROLL, YANCEY & FARRELL

JOHN A. BOLLES

PROOF OF SERVICE

I, John A. Bolles, attorney for the petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing application for writs on:

Walter F. Gemeinhardt, Esq.
1328 First National Bank of Commerce Building
New Orleans, Louisiana 70112

George W. Healy, III, Esq.
Phelps, Dunbar, Marks, Claverie & Sims
Hibernia Bank Building
New Orleans, Louisiana 70112

Robert C. Leininger, Jr., Esq.
Lemle, Kelleher, Kohlmeyer &
Matthews
1800 First National Bank of
Commerce Building
New Orleans, Louisiana 70112

Christopher Tompkins, Esq.
Deutsch, Kerrigan & Stiles
One Shell Square
New Orleans, Louisiana 70139

By mailing a copy thereof, postabe prepaid addressed to their respective offices, this 1st day of February , 1974.

JOHN A. BOLLES

Printed copies mailed

February 5, 1974

APPENDIX "A"

2 E. PARKER v. S/S DOROTHE OLENDORFF

Appeals from the United States District Court for the Eastern District of Louisiana

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion July 24, 1973, 5 Cir., 1973, ____ F.2d ____).

(November 8, 1973)

Before AINSWORTH, GODBOLD and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

AINSWORTH, Circuit Judge, dissenting: I dissent from failure to grant a rehearing, for reasons expressed in my dissent to the majority opinion.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

Appeals from the United States District Court for the Eastern District of Louisiana

(July 24, 1973)

Before AINSWORTH, GODBOLD and CLARK, Circuit Judges.

CLARK, Circuit Judge: Edward Parker was injured while loading cargo on board the S/S DOROTHE OLDENDORFF.[1] The injury occurred when a wire band broke as a fellow longshoreman attempted to lift a bale of pulp paper by means of pulling against the band with a hand-held metal J-hook. The loose bale fell on Parker's leg. Seeking third party damages in addition to longshoremen's compensation, Parker sued the vessel, its owner (Egon Oldendorff), and the time charterer (Holland-America Line). The three primary defendants completed the usual triangle by joining as a third-party J. P. Florio & Co., the stevedore contractor which employed the plaintiff. Florio thereupon brought in as a fourth-party defendant International Paper Company, the packager of the bale of pulp paper which struck the plaintiff.

Parker's claims against the three primary defendants, based on negligence and unseaworthiness, were tried to a jury. The third party actions for indemnity

[1]The plaintiff has styled his suit as "Parker v. S/S Dorothe Olendorff". The correct spelling of the name of the vessel and its owner is "Oldendorff".

were reserved for the court sitting without a jury. At the end of the plaintiff's case, the court granted the motion of Holland-America Line for directed verdict. The plaintiff's remaining claims against the vessel and its owner were submitted to the jury which found for the defendants. Subsequently, the court held that neither Florio nor International Paper had breached any warranty owed to the primary defendants and denied all claims for indemnity.

Parker appeals from (1) the directed verdict granted to Holland-America Line and (2) the jury verdict in favor of the vessel and its owner. We affirm the directed verdict for Holland-America Line, but reverse the jury verdict for the other defendants. The vessel, its owner, and Holland-America appeal from the denial of indemnity against Florio. We affirm this ruling.

I.

As pointed out above, the motion for a directed verdict made by the time charterer, Holland-America Line, was granted at the conclusion of the plaintiff's case.[2] To this point in the trial, there was absolutely no evidence upon which a jury might find Holland-America liable for operational negligence. None of the plaintiff's witnesses offered testimony which showed that Holland-America or its agents exercised control

[2]The record as supplemented clearly refutes the assertion made by counsel or Parker at oral argument that the trial court withheld its ruling on Holland-America's motion for directed verdict until after all the evidence was in. The motion was granted at the conclusion of the plaintiff's case and prior to the presentation of any defense witnesses.

APPENDIX "B"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2112

EDWARD PARKER,
Plaintiff-Appellee-
Cross Appellant,

versus

S/S DOROTHE OLENDORFF,
Defendant-Cross Appellee,

EGON OLENDORFF,
Defendant-Third Party Plaintiff-
Appellant-Cross Appellee,

HOLLAND-AMERICA LINES, INC.,
Defendant-Third Party Plaintiff-
Appellant-Cross Appellee,

versus

J. P. FLORIO & COMPANY,
Third Party Defendant-Fourth Party
Plaintiff-Appellee,

INTERNATIONAL PAPER COMPANY,
Fourth Party Defendant.

Appeals from the United States District Court for the Eastern District of Louisiana

(July 24, 1973)

Before AINSWORTH, GODBOLD and CLARK, Circuit Judges.

CLARK, Circuit Judge: Edward Parker was injured while loading cargo on board the S/S DOROTHE OLDENDORFF.[1] The injury occurred when a wire band broke as a fellow longshoreman attempted to lift a bale of pulp paper by means of pulling against the band with a hand-held metal J-hook. The loose bale fell on Parker's leg. Seeking third party damages in addition to longshoremen's compensation, Parker sued the vessel, its owner (Egon Oldendorff), and the time charterer (Holland-America Line). The three primary defendants completed the usual triangle by joining as a third-party J. P. Florio & Co., the stevedore contractor which employed the plaintiff. Florio thereupon brought in as a fourth-party defendant International Paper Company, the packager of the bale of pulp paper which struck the plaintiff.

Parker's claims against the three primary defendants, based on negligence and unseaworthiness, were tried to a jury. The third party actions for indemnity

[1]The plaintiff has styled his suit as "Parker v. S/S Dorothe Olendorff". The correct spelling of the name of the vessel and its owner is "Oldendorff".

were reserved for the court sitting without a jury. At the end of the plaintiff's case, the court granted the motion of Holland-America Line for directed verdict. The plaintiff's remaining claims against the vessel and its owner were submitted to the jury which found for the defendants. Subsequently, the court held that neither Florio nor International Paper had breached any warranty owed to the primary defendants and denied all claims for indemnity.

Parker appeals from (1) the directed verdict granted to Holland-America Line and (2) the jury verdict in favor of the vessel and its owner. We affirm the directed verdict for Holland-America Line, but reverse the jury verdict for the other defendants. The vessel, its owner, and Holland-America appeal from the denial of indemnity against Florio. We affirm this ruling.

I.

As pointed out above, the motion for a directed verdict made by the time charterer, Holland-America Line, was granted at the conclusion of the plaintiff's case.[2] To this point in the trial, there was absolutely no evidence upon which a jury might find Holland-America liable for operational negligence. None of the plaintiff's witnesses offered testimony which showed that Holland-America or its agents exercised control

[2]The record as supplemented clearly refutes the assertion made by counsel or Parker at oral argument that the trial court withheld its ruling on Holland-America's motion for directed verdict until after all the evidence was in. The motion was granted at the conclusion of the plaintiff's case and prior to the presentation of any defense witnesses.

over the methods employed in loading the pulp bales. In view of the complete absence of evidence of operational negligence by Holland-America, a directed verdict at the close of the plaintiff's case was proper.[3] *See, e.g., Louisville & N. Ry. v. Chatters*, 279 U.S. 320, 329-33, 49 S.Ct. 329, 332-33, 73 L.Ed. 711 (1929); 5A Moore, Federal Practice, § 50.02(1), n. 7.

II.

Parker seeks reversal of the jury verdict for the vessel and its owner for failure to properly instruct the jury in regard to the application of the warranty of seaworthiness to the wire bands which bound the bales of pulp paper. In response to separate interrogatories the jury found that the ship was not unseaworthy and that the shipowner, through its officers and employees, was not negligent. The adverse finding on negligence is not contested on appeal. Because the charge taken as a whole failed to give the jury adequate guidance for the resolution of the factual issues presented by the evidence, we reverse.

The mechanics of Parker's injury are undisputed. A fellow longshoreman had placed his J-hook under the band around a 500-pound bale of pulp paper and

---

[3]The only testimony indicating that Holland-America's superintendent of cargo had directed that longshoremen move the bales by inserting their hooks under the wire straps came from witnesses called by the Oldendorff defendants subsequent to the granting of Holland-America's motion for directed verdict. Such later testimony, whatever its probative value in regard to Holland-America's negligence, cannot be relied upon by the plaintiff to upset the directed verdict previously properly granted at the close of the plaintiff's evidence.

pulled the bale off of a pallet. The band broke causing the heavy bale to tumble down on Parker's leg. Parker claimed that the band which broke was inadequate for its use in moving the bale during loading and that this constituted an unseaworthy condition for which the vessel owner was liable. The vessel owner offered no evidence indicating that the wire band was adequate for this purpose, its defense being directed almost exclusively to establishing its own right of indemnity against the stevedore contractor who was in immediate control of the loading operation.

At the pre-argument conference, Parker requested the following jury charge:

> If you find the wire [with] which the bales were bound was too light for one of its purposes, namely its use in dragging the bales of wood pulp after longshoremen's hooks had been connected therewith, that this wiring would be defective and defective wiring would constitute unseaworthiness.

The defendants did not object to the form or substance of the requested instruction and the trial court informed counsel for Parker that this requested charge would be given. However, after counsel had argued, the court omitted the proposed instruction from its charge to the jury. When Parker took exception to the failure to give the instruction, the court stated that it had decided that the requested charge "was not a correct statement of the law" and therefore would not be given.

We cannot agree with the court below that Parker's requested instruction misstates the applicable law. The proposed charge has two distinct purposes. First, it directs the jury's attention to the legal principle, recognized by the Supreme Court in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962), that a vessel's warranty of seaworthiness extends to the containers in which cargo is stored. As the Court explained in *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 213-14, 83 S.Ct. 1185, 1190, 10 L.Ed.2d 297 (1963), *Ellerman* and prior cases establish

> .... that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used. . . . When the ship owner accepts a cargo in a faulty container . . . he assumes the responsibility for injury that this may cause to seamen or their substitutes on or about the ship.

See Lucas, *Flood Tide: Some Irrelevant History of the Admiralty*, 1964 *Sp. Ct. Rev.* 249, 250-56. After *Ellerman* and *Gutierrez*, there is no doubt that an inadequate or defective cargo container renders a vessel unseaworthy as a matter of law. *See Noble v. Lehigh Valley Railroad Co.*, 388 F.2d 532 (2d Cir. 1968). Second, the requested charge instructs the jury that one of the intended purposes of the band which broke was to serve as a point of attachment for longshoremen's hooks during loading. This part of the instruction is

crucial because it establishes the legal standard by which the strength of the bands is to be judged. While a vessel warrants that every cargo container is adequate to protect the cargo and to prevent spillage, common sense indicates that a shipowner does not warrant every part of any cargo container is strong enough to serve as a point of attachment for longshoremen's hooks or other lifting devices. Thus, the vessel owner is not an insurer against accidents resulting from lifting cargo by metal straps which are not intended for such use. *Reed v. M. V. Foylebank*, 415 F.2d 838 (5th Cir. 1969), *cert. denied*, 397 U. S. 910, 90 S.Ct. 909, 25 L.Ed.2d 91 (1970). On the other hand, with some types of cargo the use of bale bands for lifting and dragging may be an operating condition which should be reasonably anticipated. If it is, the vessel as a matter of law warrants the bands sufficiently strong for this purpose. See *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193, 197-98 (5th Cir.) *cert. denied* 389 U.S. 828, 88 S.Ct. 86, 19 L.Ed.2d 84 (1967); *Mills v. Mitsubishi Shipping Co.*, 358 F.2d 609, 612-13 (5th Cir. 1966) *cert. denied* 386 U.S. 1036, 87 S.Ct. 1474, 18 L.Ed.2d 600 (1967); *Walker v. Harris*, 335 F.2d 185, 191 (5th Cir.) *cert. denied*, 397 U.S. 930, 85 S.Ct. 326, 13 L.Ed.2d 342 (1964). The evidence before the trial court, including the testimony of expert stevedores called by the defendants, showed that as a matter of long standing custom the normal method by which paper pulp bales are moved during final stowage is by inserting longshoremen's hooks under the bale bands. Pulp bales cannot be manhandled without hooks because the exterior is slick and smooth. The alternative of inserting J-hooks directly in the bales damages the cargo and

is universally considered unacceptable by shippers. Since undisputed testimony showed that it was reasonably foreseeable that the bands would be used as points of attachment for longshoremen's hooks, the plaintiff was entitled to a limited peremptory instruction that the shipowner warranted the bands to be safe as appliances for handling the bales. See *United States Lines Co. v. King*, 363 F.2d 658, 660-61 (4th Cir. 1966).

The court's last change of heart not only denied the plaintiff a correct charge which he reasonably expected to be given and upon which he based his argument to the jury, see F.R.Civ.P. 51, it also left the jury unguided on a very crucial point of their deliberations — the known or intended use of the bands. Since intended purpose establishes the standard by which warranty of seaworthiness is to be judged, instructions on this issue were central to the correct resolution of the question of whether the bands were "adequate". The court's general charge contains absolutely no reference to the application of the warranty of seaworthiness to the bands. The only part of the charge which directed the jury's attention to the fact that the bands constituted a part of the ship's gear which could play a role in determining unseaworthiness came in an instruction the court read as being given "at the request of the defendant" which stated:

> The shipowner does not warrant the seaworthiness of the cargo per se, but does warrant the seaworthiness of the cargo container; that is the bands in this case. If you find that the bands in this case were reasonably fit for the

> purpose for which they were to be used, the vessel would not be unseaworthy.

But this instruction was not the equivalent of the charge promised to the plaintiff and later withdrawn. While it told the jury that the bands were within the warranty of seaworthiness it gave them no clue whatsoever that the purpose of the bands was the key to deciding whether the warranty was sustained or breached. Bands reasonably fit to keep a bale bound together could be patently too weak for use in moving the bale from place to place.

In *Marshall v. Isthmian Lines, Inc.*, a case similar on its facts to the one *sub judice*, this court held that, where the central issue for the jury was the standard of care applicable to the decision of a vessel to accept cotton bales with defective bindings, the trial court was under an affirmative obligation to explain the effect of certain federal regulations bearing on the duty of the shipowner. In reversing the jury verdict, we pointed out:

> Under these conditions, it was not enough to leave the whole thing within the vague contours of a general charge with the inescapable boilerplate instructions on negligence and the like. . . . We and other courts have held that the duty is to give instructions which are meaningful and translated — not in terms of some abstract case — but into the facts of this particular case. . . . [W]hen the jury undertakes to resolve [a disputed issue of fact], they are entitled to be told what the dispute is all about.

334 F.2d 131, 138 (5th Cir. 1964). In the present case, the plaintiff requested an instruction which was a correct statement of the law and was factually in accord with the undisputed evidence. The request was central to the plaintiff's case and the subject matter was not adequately covered elsewhere in the court's charge. We are left with the firm conviction that the jury verdict must be reversed. *Boothe v. Holmes*, 399 F.2d 495, 499-501 (5th Cir. 1968); *Lind v. Aetna Casualty & Surety Co.*, 374 F.2d 377, 380-81 (5th Cir. 1967). A new trial of the unseaworthiness issue under procedures not inconsistent with our opinion here is required.

In addition to his complaints about the jury charge,[4] Parker contends that he was entitled to a directed verdict against the vessel and its owner since the method

---

[4]Parker also appeals from the failure to give his requested charge on the doctrine of res ipsa loquitur in addition to the lack of clarity in the charge on operational negligence. Since Parker failed to raise either of these points in his objections to the charge before the jury retired, the asserted errors were not preserved for appeal. F.R.Civ.P. 51. In light of the retrial by our decision above, we point out that in so far as the court's instruction suggested that "continuing operational negligence" by the employees of the stevedore would not create an unseaworthy condition for which the ship would be liable, the charge was not a correct statement of the law. Usner v. Luckenbach Overseas Corp., 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971), distinguished between isolated, personal negligent acts of fellow longshoremen and conditions of unseaworthiness. Our subsequent opinion in Robinson v. Showa Kaiun K. K. makes clear, however, that a continuing series of negligent acts by longshoremen may become so related to the status of the vessel, that the longshoremen's action following the negligent practice might give rise to liability under the unseaworthiness doctrine. 451 F.2d 688, 690 (5th Cir. 1971); see Kyzar v. Vale Do Ri Doce Navegacai, S.A., 464 F.2d 285, 289-92 (5th Cir. 1972).

of stowage created an unsafe place for him to work as a matter of law. Since a favorable decision on appeal on this issue would require us to render a judgment on liability for Parker, we must reach the merits of this contention. The evidence showed that Parker was injured while working on top of a high pile of pulp bales and that at the edge of the pile was a deep trench, running across the entire width of the ship, which had been purposefully left open during the loading at the ship's direction to protect the pulp paper cargo from contamination by an adjoining load of carbon black. Assuming arguendo that this open gap in stowage created an unseaworthy condition, there was a dispute of fact whether the existence of the trench contributed to Parker's injury. *See Wilson v. Societa Italiana de Armamento (Sidarma)*, 409 F.2d 484 (5th Cir. 1969). While Parker argues that the trench prevented his escape from the tumbling bale, two of his own witnesses testified that the bale struck Parker, pinning him against another bale, before he had any chance to move. Whether the trench constituted an unseaworthy condition, and whether its existence was a proximate cause of the injury, were undoubtedly jury questions and a directed verdict on this claim was properly denied.

III.

The vessel, its owner, and the time charterer appeal from the denial of indemnity against the stevedore contractor. At the conclusion of the non-jury phase of the trial, the court found that the "third-party plaintiffs have failed to show by a preponderance of the evidence that any of the activities of the third-party defendant

constituted a breach of any warranty which may have been owed or that any of the actions of the third-party defendant constituted negligence. On the contrary, the evidence established that J. P. Florio and Company, Inc., conducted its work in a safe and workmanlike manner."

If it were not clear at the time of the decision below, it has now become settled law that a third-party action for indemnity under the *Ryan* doctrine[8] must flow from negligence or a breach of the stevedore's warranty of workmanlike performance; the stevedore is not an insurer either against affirmative liability or against costs and attorneys' fees resulting from actions brought by injured longshoremen. *Diaz v. Western Ventures, Inc.*, 467 F.2d 1361 (5th Cir. 1972), *cert. denied* ___U.S. ____, 93 S.Ct. 1445, ____L.Ed.2d ____ (1973). Therefore, in order to receive indemnity against the stevedore, the third-party plaintiffs must demonstrate that the district court's finding that they failed to prove negligence or breach of contractual warranty is clearly erroneous. *Delaneuville v. Simonsen*, 437 F.2d 597 (5th Cir. 1971).

As pointed out above, the testimony uniformly showed that the lifting and dragging of pulp bales from pallet boards to final stowage by inserting longshore-

---

[8]Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1956); *see also* Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U.S. 563, 78 S.Ct. 438, 2 L.Ed.2d 491 (1958); Crumady v. The Joachim Hendrik Fisser, 358 U.S. 423, 79 S.Ct. 445, 3 L.Ed.2d 413 (1959); Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., 376 U.S. 315, 84 S.Ct. 748, 11 L.Ed.2d 732 (1964).

men's J-hooks under the bale bands was the customary practice at the Port of New Orleans. The fact that a practice is customary does not, of course, prove that it is a safe or workmanlike method to handle cargo. *Curtis v. A. Garcia Y Cia, Ltda.*, 272 F.2d 235, 237, 85 A.L.R.2d 1186 (3rd Cir. 1959); *see also Salem v. United States Lines*, 370 U.S. 31, 37, 82 S.Ct. 1119, 1123, 8 L.Ed.2d 313 (1962); *Burns v. Anchor-Wate Co.*, 469 F.2d 730, 734-35 (5th Cir. 1972); *June T., Inc. v. King*, 290 F.2d 404, 405-406 (5th Cir. 1961). However, in the present case, stevedoring experts also testified that dragging pulp bales by the wire bands was a normally safe practice. Indeed, Florio's stevedore superintendent, called by the Oldendorff parties, stated that in his 15 years of experience on the docks he had never known a band on a bale of wood pulp to break during loading prior to the day of Parker's accident. The only proof to the contrary came from the witness, Percy Perry, a longshoreman who worked on the crew with Parker. He testified that the use of hooks in the movement of this type of cargo was necessary because the wire would make a man's hands too sore to permit him to work for extended periods, and he further testified that small wire of the size used here tends to break frequently. In describing the experience in the *Dorothe Olendorff* on the morning of Parker's injury Perry variously stated the number of breaks in wire bands to be "a few", "several", "some", "seven", and "it might have been ten or twelve or it might have been two or three" (He saw "two or three"). It is obvious that the court as the trier of fact on this issue did not credit Perry's testimony as establishing

that the stevedore had engaged in an unsafe loading procedure.

The only specific evidence indicating that a popped band had caused an injury on this particular day related to another longshoreman, Tanner, who had been slightly injured when the wire band on another bale in the same load broke, causing him to fall off the bulkhead. The third-party plaintiffs argue that this earlier accident put the stevedore contractor on notice of the inadequate or dangerous nature of the bands on this load of pulp and that the failure to conduct an inspection of the bands on the remaining bales or to change to a different method of loading was a breach of the duty owed by the stevedore to the vessel. *See Brock v. Coral Drilling, Inc.*, 477 F.2d 211, 215-17 (5th Cir. 1973); *Burrage v. Flota Mercante Grancolombiana, S. A.*, 431 F.2d 1229, 1232-33 (5th Cir. 1970); *T. Smith & Son, Inc. v. Skibs A/S Hassel*, 362 F.2d 745, 747 (5th Cir. 1966).

The fact that a stevedore contractor continues to work a load of cargo by use of the bale bands with the knowledge that the band on a single bale caused injury when used for lifting does not as a matter of law constitute the continuation of this general practice a breach of the warranty of workmanlike performance. *See Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., supra*, 369 U.S. at 364, 82 S.Ct. at 786, *reversing, Beard v. Ellerman Lines, Ltd.*, 289 F.2d 201, 207 (3rd Cir. 1961). In the present case, following the first accident involving a broken band, the stevedore contractor's foreman took what the court could have found was adequate corrective action by warning his crew to be more cautious and to avoid stand-

ing near the open bulkhead while pulling on the bands. In light of his long experience that the breaking of wire bands while moving pulp bales was extraordinarily rare, his failure to stop the lifting of bales off of pallets by the bands was not unreasonable. On the facts disclosed by this record, we cannot conclude that the finding by the district court that the third-party plaintiffs failed to meet their affirmative burden of proving negligence or a breach of the warranty of workmanlike performance is clearly erroneous. *Garner v. Cities Service Tankers Corp.*, 456 F.2d 476 (5th Cir. 1972), *Scott v. S. S. Ciudad De Ibague*, 426 F.2d 1105 (5th Cir. 1970); *Humble Oil & Refining Company v. Philadelphia Ship Maintenance Company*, 444 F.2d 727 (3rd Cir. 1971). Having had a full fair opportunity to try the indemnity issue to the court, the parties are not entitled to a second trial of that issue merely because we have reversed the jury-tried portion of the case on unseaworthiness.

Affirmed, in part,
Reversed, in part, and
Remanded.

AINSWORTH, Circuit Judge, dissenting:

I cannot join the majority in the reversal of the judgment in favor of defendants, dismissing plaintiff's suit, rendered on answers by the jury to written interrogatories, that the vessel was not unseaworthy and the shipowner was not negligent, where the basis assigned in the majority opinion is the stated inadequacy of an instruction of the trial judge to the jury on what constitutes unseaworthiness.

The trial judge did not give the instruction on unseaworthiness in the language proffered by plaintiff's counsel, though he had agreed to do so. But the instruction which the Court gave was sufficient to cover what was reasonably necessary under the facts developed in the trial. Considering the instructions as a whole and the specific charge as to unseaworthiness in connection with the cargo bands, I believe the charge was sufficient under the law and prior holding in this court, and that the jury could and did intelligently decide the case on the evidence. We said in *Delancey v. Motichek Towing Service, Inc.*, 5 Cir., 1970, 427 F.2d 897, 902:

> "A litigant is entitled to have a trial judge advise the jury of his claims and theories of law, if, they are supported by the evidence and brought to the attention of the court. Nehring v. Empresa Lineas Maritimas Argentinas, 5 Cir. 1968, 401 F.2d 767; Marshall v. Isthmian Lines, Inc., 5 Cir. 1964, 334 F.2d 131; Oliveras v. United States Lines Co., 2 Cir. 1963, 318 F.2d 890. The court is not required to give instructions in the language and form a litigant's lawyer fancies. The court has 'considerable latitude in the choice of language used to convey to the jury in a clear and correct fashion the applicable law'. Kayo Oil Co. v. Sammons, 5 Cir., 1963, 321 F.2d 729, 730. See also Nowell v. Dick, 5 Cir., 1969, 413 F.2d 1204. If the instruction as given sufficiently covers the case so that a jury can intelligently determine the questions presented, the judgment will not be disturbed because further amplifi-

cation is refused. United States v. Bayer, 1947, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 654; Ohio & Mass. Ry. v. McCarthy, 1878, 96 U.S. 258, 24 L.Ed. 693."

The district court's failure to give the jury charge agreed upon was a matter of trial court discretion which I consider was not abused, and which does not require reversal. See *M. H. Trawick v. Manhattan Life Ins.*, 5 Cir., 1973, ____ F.2d ____ [No. 72-1706, June 18, 1973].

Especially disturbing is the conclusion of the majority to foreclose the issue of indemnity against third-party plaintiffs, on remand and retrial of this case. Fundamental equity requires that the indemnity issue should likewise be retried. Third-party plaintiffs are deprived of basic fairness by the majority's denial of the opportunity to develop facts and evidence in light of the majority opinion and to obtain a new ruling on the issue of indemnity. If plaintiff is to be accorded a new day on the question of unseaworthiness, evenhanded justice also requires a similar opportunity to third-party plaintiffs on the indemnity issue.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.